

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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CC Docket No. 93-2

In the Matter of)
)
Amendment of Part 21 of the)
Commission's Rules for the)
Domestic Public Fixed Radio)
Services)

To: The Commission

COMMENTS

NYNEX Mobile Communications Company, by its attorneys, on behalf of its operating subsidiaries and partnerships in which it holds a managing partner's interest, submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released February 9, 1993, in the above-captioned proceeding.¹

I. INTRODUCTION

In the NPRM, the Commission invites comments on its proposal to revise Part 21 of the Rules to permit applicants for new or modified facilities in the Point-to-Point Microwave Radio Service

¹ NMCC makes extensive use of point-to-point microwave services to provide service throughout its markets, in both Metropolitan and Rural Service Areas. The use of microwave facilities permits NMCC to exercise greater control over the operation and maintenance of its cellular systems. In addition, by using its own microwave facilities, NMCC has achieved significant savings in the cost of facilities. While the use of microwave facilities has enhanced NMCC's ability to respond to the growing demand for cellular service by deploying and activating cell sites as quickly as possible, the licensing procedures currently set forth in Part 21 often neutralizes the benefits that otherwise could be realized through the use of microwave facilities. As a result, NMCC will be directly affected by, and has a vital interest in, the rule changes being proposed in the NPRM.

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("PPMS") to begin construction of the proposed facilities prior to grant of an authorization. In addition, the NPRM seeks comments on the proposed revision and elimination of several reporting requirements for all Part 21 applicants, including PPMS applicants (Para. 1).

NMCC applauds the Commission's on-going efforts to modify its regulatory regime in a manner that would eliminate or streamline unnecessary and inefficient regulations thereby permitting the earlier introduction of services to the public. Unfortunately, the rule changes proposed by the Commission attack the wrong problem and, as a result, are not likely to assist PPMS applicants in bringing their services to the public more quickly.

The rules proposed would permit applicants to commence construction as soon as possible. However, by requiring these applicants to obtain Commission approval prior to the commencement of operation, the Commission has ensured that the introduction of service would be delayed by the period of time that the Commission has historically required to grant applicants required radio authorizations. If the Commission is to provide meaningful relief for Part 21 applicants, it must adopt rules that permit PPMS applicants to commence operation prior to receipt of authorization.

The proposals advocated by McCaw presented the Commission with an alternative that would offer such relief to PPMS applicants without any substantial regulatory risks. NMCC urges the Commission to adopt the McCaw proposal and permit applicants

to use current temporary-fixed microwave licensing procedures to initiate permanent point-to-point microwave service.

II. THE RULES PROPOSED BY THE COMMISSION ARE NOT LIKELY TO PRODUCE ANY SIGNIFICANT BENEFITS FOR PPMS APPLICANTS

The proposed rules would permit a PPMS applicant to engage in construction upon filing FCC Form 494, unless its application: (1) is mutually exclusive with a previously filed application or has a petition to deny filed against it; (2) requests a waiver pursuant to Section 21.19 of the Rules; (3) is returned as unacceptable for filing pursuant to Section 21.20; (4) requires FCC approval not yet received; (5) fails on its face to demonstrate that there are no unresolved environmental issues; or (6) is within 35 miles of the Canadian or Mexican borders or is otherwise subject to a treaty between the United States and Canada or Mexico regarding frequency coordination (NPRM, para. 5).²

² The Commission also proposed to eliminate or streamline a number of existing reporting requirements. The filing of FCC Form 494A to notify the Commission of completion of construction would no longer be required (NPRM, paras. 15-16). Part 21 applicants would no longer report licensee qualification information on FCC Form 430. Instead, applicants would report such information on a revised Form 494 or in a letter to the Commission (NPRM, para. 18). Finally, a new FCC Form 705 would be used to report information related to assignments or transfers of control by Part 21 licensees currently reported on FCC Forms 702 and 704 (NPRM, para. 19). These proposals will eliminate the use of forms that either do not provide the Commission with meaningful information or provide the Commission with redundant information. The rule changes should be adopted. The Commission's scarce resources are better spent on more critical matters.

In proposing these rules, the Commission was guided by its concern that:

Often, construction of PPMS facilities must be coordinated with construction projects for cellular, satellite, or other telecommunications services. Unnecessary delays in the commencement of construction of facilities can occur under the current rules which can have a substantial impact on construction costs for PPMS applicants and ultimately for the public. These delays may hinder the ability of PPMS providers to compete to satisfy certain requirements (NPRM, para. 3).

NMCC has compared the current and proposed rules to determine whether the revisions proposed in the NPRM would provide PPMS applicants with any meaningful flexibility in constructing and introducing their services. The result of that comparison showed that the proposed rules simply transfer regulatory delays currently experienced by PPMS applicants at the construction phase to the operational phase. In our view, the rules are not likely to appreciably reduce construction costs for PPMS applicants or to provide them with any meaningful flexibility.³

Under existing rules, the PPMS applicant must first conduct prior frequency coordination with other licensees and applicants. Following completion of this process, the applicant files an FCC Form 494 Application for authority to construct facilities and must receive Commission authorization prior to the commencement

³ Construction of PPMS facilities is not a complex undertaking. The planning for the construction of PPMS facilities is generally undertaken at the same time as the planning for the overall project. In NMCC's case, PPMS facilities are often placed on existing structures (e.g., towers, cell sites) and require, on average, about ten days to construct.

of construction.⁴ The Commission generally issues a public notice granting a conditional license authorizing construction within a minimum of 75 to 90 days from the date of filing, and often longer.⁵ After construction is completed, PPMS applicants can commence operation of their facilities coincident with the filing of FCC Form 494A with the Commission. This process usually requires approximately 135 days or more.⁶

Under the rules proposed in the NPRM, applicants would still be required to conduct frequency coordination with other licensees and applicants. Once this process is completed, applicants would file FCC Form 494 proposing the construction of new or modified facilities. This application would appear on public notice for thirty days. Assuming that no petitions to deny are filed against the Application, and it is not otherwise subject to the conditions contained in proposed Section 21.43(c)(3), the applicant could, at its own risk, commence construction before receiving authorization. The applicant could not, however, commence operation of the constructed facilities until the radio authorization is granted.

⁴ The Form 494 Application is subject to a thirty day public notice period.

⁵ There have been numerous instances where NMCC has waited between 6 to 9 months from the date its application appeared on public notice as accepted for filing.

⁶ See, e.g., Petition for Rulemaking filed by McCaw Cellular Communications, Inc., filed October 16, 1991, pp. 10-11, Appendix 1.

If, as expected, the Commission continues to require 135 days or more to grant the authorization, the proposed rules would not provide PPMS applicants with meaningful relief.⁷ Applicants would be in an anomalous position of having taken advantage of the Commission's Rules to construct their facilities in a coordinated manner with related cellular or other projects, but unable to introduce service to the public.⁸

III. THE COMMISSION CAN PROVIDE PPMS APPLICANTS WITH NEEDED FLEXIBILITY BY ADOPTING THE RULES PROPOSED BY MCCAW

A. The McCaw Proposal Would Produce Public Benefits

In its Petition for Rulemaking, McCaw proposed that the Commission permit PPMS applicants to use the temporary-fixed procedures set forth in Sections 21.707 and 21.708 as a way to initiate permanent point-to-point microwave applications.⁹ Under McCaw's proposal, PPMS applicants could commence construction or operation under temporary-fixed authorization procedures. Applicants choosing to do so would either be required to file FCC

⁷ The rules changes proposed in the NPRM do not appear designed to reduce the time required by the Commission's staff to process the applications received from PPMS applicants.

⁸ Rather than reducing construction costs incurred by applicants, the new rules could have the undesirable effect of increasing an applicant's cost of construction by requiring the applicant to incur carrying charges associated with constructed facilities which remain fallow and non-revenue producing until authorization is received.

⁹ Under those procedures, PPMS applicants may commence construction and operation for a period of less than six months upon at least five days notice to the Commission, provided that prior frequency coordination is completed and that certain other conditions are met. 47 C.F.R. Sections 21.707 and 21.708.

Form 494 within thirty days of the expiration of the six month period (or five months after commencement of operations) or commence construction and operation upon filing FCC Form 494. Under either procedure, the applicant would be required to notify the Commission that it is seeking a permanent authorization at the expiration of the six month period of temporary operations (McCaw Petition, pp. 18-21; NPRM, para. 11).

The comments filed in support of the McCaw Petition demonstrate that the proposal would have numerous public interest benefits.¹⁰ The McCaw proposal would permit a cellular carrier the flexibility to offer improved services to users in a more timely and economical fashion.

B. The Reasons Given By the Commission In Rejecting The McCaw Proposal Are Not Well-Founded

In denying the McCaw Petition, the Commission did not dispute the public benefits that the McCaw proposal would produce. Instead, the Commission reasoned that "PPMS applications are generally not appropriate for pre-authorization operation due to the complex nature of the PPMS and the potential for unacceptable frequency interference" (NPRM, para. 14). As stated by the Commission:

PPMS users rely upon the public notice and comment period to verify that the prior coordinated frequencies are indeed the frequencies identified on the subject

¹⁰ See, e.g., Comments of US West NewVector Group, Inc., Comments of Centel Cellular Company, and Comments of NYNEX Mobile Communications Company. Rather than repeating these comments in detail, they are incorporated herein by reference.

application. Under the McCaw proposal, other users of the spectrum allocated to PPMS would be able to compare prior coordinated frequencies with those requested in the application only after an applicant has commenced operations of proposed facilities: those users may wait as long as five months before the application appears on public notice. Parties wishing to oppose grant of an authorization for facilities proposed in the PPMS would similarly be obliged to wait as long as five months... before filing petitions alleging harmful interference or other problems with operating the proposed facilities (NPRM, para. 14).

These Commission concerns are not well-founded. The Commission's concern that applicants would prior coordinate certain frequencies but include other frequencies in their actual filings with the Commission does not accurately reflect the strong working relationships between applicants and licensees. Nor is it likely that the rules would disadvantage parties wishing to oppose a grant based on claims of harmful interference.

In the past, carriers have undertaken prior frequency coordination in a rigorous manner because it is required by the Commission's Rules and, more importantly, because it makes good business sense to do so. In NMCC's case, the process of finding a frequency or block of frequencies that will operate without interfering with other users is an essential part of engineering any microwave route. Once NMCC designs a workable system, it circulates to other proposed and licensed common carriers the required prior coordination notice indicating the frequency assignment and system characteristics of the proposed system. In the event that any objections are received from other licensees

or applicants, NMCC works with the complaining parties to resolve such objections, which often times includes modifications or upgrades to a proposed or existing system. NMCC follows the same procedures, although on an expedited basis, on those occasions where it has initiated operations of temporary-fixed facilities.

Over the past ten years, NMCC has filed hundreds of applications for cellular and microwave facilities. Not a single application has been subject to a petition to deny based on claims of interference. There is no reason to believe that permitting applicants to use the temporary-fixed procedures that have worked so well in the past will cause applicants to modify their established frequency coordination practices. On the other hand, the use of those procedures would permit applications to introduce service significantly earlier than would be permitted under the NPRM.


IV. CONCLUSION

The rules proposed by the Commission would not, as the Commission hoped, result in improved service to the public. To do so, the Commission must permit the pre-authorization operation of facilities by applicants using the temporary-fixed procedures currently embodied in the rules.

WHEREFORE, NMCC supports the adoption of rules proposed in the NPRM consistent with our comments filed herein.

Respectfully submitted,

NYNEX Mobile Communications
Company

By: 
Edward R. Wholl

2000 Corporate Drive
Orangeburg, NY 10962
(915) 365-7515

Its Attorney

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